Legal Update

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The SJC holds that the breathalyzer model, Alcotest 7110 MK III-C, is scientifically reliable!

Commonwealth v. Kirk Camblin, SJC No. 11774, (2017): This appeal stems from a defendant who was charged with Operating under the Influence of alcohol in 2008. Prior to the trial the defendant moved to exclude the admission of the breath test arguing that the device's computer-source code and other deficiencies produced erroneous results. The initial case went to trial and the defendant was found guilty of operating under the influence of alcohol. The defendant appealed and the primary issues that the SJC heard on appeal focused on the breathalyzer machine and the calibration test. The SJC remanded ***Commonwealth v. Camblin*** to District Court to consider three issues:

1. **Reliability of the Alcotest source code**
2. **Whether the Alcotest is capable of testing exclusively for ethanol;**
3. **Whether any source code errors affect the ability of the Alcotest to calculate a subjects' blood alcohol content.**

The district court judge considered a motion to introduce expert testimony under the ***Daubert–Lanigan*** standard. See ***Commonwealth v. Powell***, 450 Mass. 229, 238 (2007). The factor that were considered were "whether the scientific theory or process (1) has been generally accepted in the relevant scientific community; (2) has been, or can be, subjected to testing; (3) has been subjected to peer review and publication; (4) has an unacceptably high known or potential rate of error; and (5) is governed by recognized

standards." ***Id***. A judge has "broad discretion" to weigh these factors and to apply varying methods to assess the reliability of the proffered testimony.

\After a Daubert-Lanigan hearing, the District Court concluded that "despite minor flaws in the source code, the Alcotest provides a reliable measure of BAC. Mass. 15 (1994). The defendant appealed the district court's findings but chose not to pursue his arguments concerning the source code as the primary basis for the asserted lack of reliability in the Alcotest. Rather, the current focus of the defendant's challenge to the reliability of the Alcotest is that it cannot distinguish ethanol from other 'interfering' substances that might be present in a breath sample.

Conclusion: The SJC upheld that the findings of the district court found that the Alcotest 7110 MK III-C breath test machine is scientifically reliable and determined that the judge committed no abuse of discretion under ***Daubert v. Merrell Dow Pharms., Inc.,*** 509 U.S. 579 (1993), and ***Commonwealth v. Lanigan***, 419.

First the judge credited the expert testimony of Hansueli Ryser and the testing conducted by two agencies: the National Highway Traffic Safety Administration (NHTSA), and the Organisation Internationale de M*é*trologie L*é*gale (OIML), an agency that regulates the use of alcohol breath-testing devices in Europe. The judge also noted that the Alcotest had been approved by the Australian International Laboratory of Spectroscopy and the Forensic Science Academy in Ottawa, Canada. "The judge's reliance on NHTSA testing did not constitute an abuse of discretion. "NHTSA certification is widely accepted by courts as evidence of a device's reliability." See ***People v. Vangelder***, 58 Cal. 4th 1, 33-34 (2013), cert. denied, 134 S. Ct. 2839 (2014) (noting that devices which meet NHTSA evidential breath-testing specifications produce sufficiently reliable results within California's regulatory scheme).

Additionally, the Alcotest appears on NHTSA's published list and satisfies the specific performance criteria that was previously established. Pursuant to G. L. c. 90, § 24K, the Secretary of Public Safety is required to promulgate regulations regarding "satisfactory methods, techniques and criteria" for the use of infrared breath-testing devices. The Executive Office of Public Safety has promulgated 501 Code Mass. Regs. §§ 2.00; which requires that the approved breathalyzers appear on the NHTSA's published conforming products list for evidential breath-testing equipment. See 501 Code Mass. Regs. § 2.38 (2006). As mentioned above, the Alcotest appears on the NHTSA's published. See 58 Fed. Reg. 48,705, 48,708 (1993) (NHTSA certification of Alcotest breathalyzer as conforming product). As part of its certification process, NHTSA tests whether, and to what extent, the Alcotest's infrared and fuel cell sensors are able to detect

interfering substances. The SJC found that the judge did not abuse his discretion in relying on the agency statutorily required to certify breathalyzers in the Commonwealth.

The judge also relied upon testimony from an expert that "the Alcotest [infrared] and [electrochemical] features were tested independently for their ability to detect non-ethanol substances and both components met the NHTSA specifications. The judge credited the expert's finding that the two-test comparison standard that the Alcotest employs is reliable. The judge noted also that each of the Alcotest's two sensors have been found compliant with the NHTSA specifications when operated individually. The independent, dual testing capability further "assures the device's ethanol specificity testing capability." If the results from either of the tests differ by more than a specified threshold, the test is rejected and testing ceases. At the time that the evidentiary hearing was held on remand, no other breathalyzer used a dual-sensor system. The judge was warranted in crediting the expert's testimony that the NHTSA and the OIML certifications further demonstrated that the Alcotest was capable of testing exclusively for ethanol.

The SJC also considered the peer-reviewed articles that were submitted by the Commonwealth, and indicate that the Alcotest is capable of distinguishing between ethanol and common interfering substances. "In addition to considering whether the Alcotest had been subject to adequate testing and peer review, the judge also found 'abundant evidence that the Alcotest and its underlying technology' had satisfied the other nonexclusive factors in the ***Daubert-Lanigan*** analysis: it has been generally accepted in the scientific community, it does not have an unacceptably high known or potential rate of error, and it is governed by recognized standards. There was no abuse of discretion in the judge's determination that these factors had been met.

Finally, the SJC addresses an issue raised by the defendant regarding general acceptance in the scientific community. The defendant contends that the Alcotest could not have been generally accepted in the scientific community at the time of his trial; he points out that the device uses proprietary technology, including its computer source code, and that Draeger [Safety Diagnostics, Inc.] exclusively sells its breathalyzers to law enforcement agencies. According to the defendant, the approval of the Alcotest for use in other countries and in other jurisdictions in the United States does not indicate general acceptance, because these governmental actors do not constitute scientific communities for purposes of the ***Daubert-Lanigan*** standard. The SJC was unpersuaded by the defedant's argument and found that governmental standard-setting agencies, such as the NHTSA, routinely conduct investigations, evaluate new and developing technologies, and set relevant scientific standards. All of these factors provide further evidence that Alcotest is reliable.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.